Filed 5/21/19 In re E.M. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re E.M. et al., Persons Coming Under the Juvenile Court Law.	B294502
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.J., Defendant and Appellant.	(Los Angeles County Super. Ct. No. 18CCJP06196)

APPEAL from orders of the Superior Court of Los Angeles County. Craig S. Barnes, Judge. Affirmed.

Christine E. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Sally Son, Deputy County Counsel, for Plaintiff and Respondent.

Mother T.J., appeals from the orders at the jurisdiction/disposition hearing, adjudicating her daughter E.M. dependent and removing E.M. from her custody.[1] The sole argument she raises on appeal is that the trial court and Department of Children and Family Services (Department) failed to conduct a sufficient inquiry under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) We conclude that mother's vague claims of Indian ancestry were insufficient to trigger any requirement for further inquiry, and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Facts and Procedure*

As the sole issue on appeal is ICWA compliance, we provide only the briefest outline of the facts and procedure. After the Department received a referral, a social worker interviewed mother at the shelter where she was living. Mother admitted smoking marijuana daily, a few feet away from the infant child. She also admitted breastfeeding the child, and did not feel her marijuana use had any impact on her breastmilk. Mother declined a safety plan which would include abstaining from marijuana while caring for and breastfeeding the infant. The social worker indicated that she would discuss with a supervisor how best to proceed; mother told her to "do whatever you gotta do," because mother would "be gone by the time you come back anyway."

Based on mother's threat to disappear with the child, the Department sought, and obtained, a removal order. The order was served the following day by two social workers and two police

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[1] The child's alleged father was located during the course of the proceedings, living out of state. He is not a party to this appeal.

officers. Mother declined to comply and commenced a violent physical altercation with the police officers, while holding the child in her arms. The child was safely removed and mother was arrested for child endangerment (Pen. Code, § 273a, subd. (a)) arising from her resistance of the removal order. Mother was incarcerated pretrial, and the child was placed in foster care.

On September 26, 2018, a petition was filed alleging that the child was dependent under Welfare and Institutions Code section 300, subdivisions (a) [physical abuse] and (b) [neglect] due to mother's violent altercation with the police while holding the child, and her abuse of marijuana. At the adjudication hearing on December 6, 2018, mother was present and out of custody. The juvenile court sustained the petition. The child remained in foster care; mother was granted reunification, including monitored visitation, counseling, and a mental health evaluation. Mother filed a timely notice of appeal.

2. *ICWA Facts and Procedure*

When mother was initially interviewed by a social worker, she stated she may have American Indian ancestry, though she did not provide any information as to tribe identification or registration numbers. The Department disclosed this in an attachment to the petition.

While incarcerated, mother missed the detention hearing, but made her first appearance a few days later. She submitted a "Parental Notification of Indian Status" form, signed under penalty of perjury. She checked the box for the option, "I have no Indian ancestry as far as I know." At the hearing, the court noted that mother had stated she had no Native American ancestry and asked if the child's alleged father did, as far as mother knew. Mother replied, "No." The court concluded it had

no reason to know the child may be an Indian child within the meaning of ICWA.

On November 15, 2018, mother was interviewed for the Department's report for the upcoming adjudication hearing. Because her statement regarding Native American heritage is the basis of mother's appeal, we quote the Department's report of that statement: "On 11/15/2018, Mother expressed she may have Native American Heritage, as her parents said she is 'mixed with Indian.' Mother had not [*sic*] further information as to tribes and did not provide [the investigator] with any further relative information or contact numbers to call to further investigate ICWA."[2]

It does not appear that the trial court or the Department took any further action based on mother's new representation of possible Native American heritage.

DISCUSSION

1. *ICWA Requirements*

"ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. [Citations.] For purposes of ICWA, an 'Indian child' is an unmarried individual under age 18 who is either a member of a federally recognized Indian tribe or is

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[2] The Department expressed concern regarding mother's mental health. The report stated, "[m]other even made inconsistent statements about ICWA and appears to have some sort of processing or cognitive issue, as her recall of events is poor and she does not appear to be able to exercise appropriate reasoning."

eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe. [Citations.]" (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 783.)

There are two separate ICWA requirements which are sometimes conflated: the obligation to give notice to a tribe, and the obligation to conduct further inquiry to determine whether notice is necessary. Notice to a tribe is required, under federal and state law, when the court knows or has reason to know the child is an Indian child. (*Id.* at p. 784.) In contrast, the Department is to make further inquiry if it "knows or has reason to know that an Indian child is or may be involved" in the case. (Cal. Rules of Court, rule 5.481(a)(4).) We are concerned here with the duty to inquire.

"[A]lthough ICWA itself does not define 'reason to know,' California law, which incorporates and enhances ICWA's requirements, identifies the circumstances that may constitute reason to know the child is an Indian child as including, without limitation, when a person having an interest in the child, including a member of the child's extended family, 'provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents or great-grandparents are or were a member of a tribe.' [Citations.]" (*In re Elizabeth M., supra,* 19 Cal.App.5th at p. 784, fn. omitted.)

"Importantly for our purposes, the burden of coming forward with information to determine whether an Indian child may be involved and ICWA notice required in a dependency proceeding does not rest entirely—or even primarily—on the child and his or her family. Juvenile courts and child protective agencies have 'an affirmative and continuing duty to inquire'

whether a dependent child is or may be an Indian child. [Citations.] This affirmative duty to inquire is triggered whenever the child protective agency or its social worker 'knows or has reason to know that an Indian child is or may be involved . . . .' [Citation.] At that point, the social worker is required, as soon as practicable, to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility. [Citations.]" (*In re Michael V.* (2016) 3 Cal.App.5th 225, 233.) "Just as notice to Indian tribes is central to effectuating ICWA's purpose, an adequate investigation of a family member's belief a child may have Indian ancestry is essential to ensuring a tribe entitled to ICWA notice will receive it." (*In re Elizabeth M., supra*, 19 Cal.App.5th at p. 787.) "ICWA and state law place the duty with the child protective agency in the first instance, not the child or his or her parent, to determine whether additional information exists that may link a child with Indian ancestry to a federally recognized tribe." (*Ibid.*)

2. *There was No ICWA Inquiry Obligation in this Case*

A parent must make some level of non-speculative showing in order to give rise to a duty of inquiry. In *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1468, the mother represented that she may have Indian ancestry through her father and deceased paternal grandfather. She could not identify the tribe and could not provide contact information for her father, nor did she mention any other relative who could provide more information. On appeal, she argued that the Department should have questioned her relatives for more information, but the Court of Appeal found that the information she provided was too

speculative to trigger that duty. To the same effect is the recent case of *In re J.L.* (2017) 10 Cal.App.5th 913. In that case, the mother's initial response to whether she had Indian ancestry was " 'not sure.' " (*Id.* at p. 916.) The mother's counsel represented that the mother had been repeatedly told by family members that she may have native heritage, but she would research it and let the court and the Department know if she found anything further. (*Ibid.*) On those facts, the trial court found that ICWA did not apply, but elicited the mother's agreement that she would immediately pass along any further information she obtained. (*Id.* at p. 917.) On appeal, the Court of Appeal agreed that ICWA had been satisfied, and the Department need not have conducted further inquiry. The court concluded that the mother's " 'general or vague' " reference to possible Indian heritage was not sufficient to trigger a duty of further inquiry. (*Id.* at p. 923; see also *In re J.D.* (2010) 189 Cal.App.4th 118, 123, 125 [grandparent's assertion that she had been informed of Indian ancestry, but could not identify a tribe and did not know of any living relatives who could provide information is too vague to give the court any reason to believe the children might be Indian children].)

Factually, this case is similar to *In re J.L.,* and should reach the same result. In *J.L.*, the mother said she was " 'not sure' " if there was Indian heritage but noted that she had been told by family members that she may have native heritage. Here, mother denied knowing of any Indian heritage, and then later added that "her parents said she is 'mixed with Indian.' " We conclude mother's vague reference to family lore of tribal heritage is insufficient, standing alone, to mandate further inquiry on the part of the Department. (*In re J.L., supra*, 10 Cal.App.5th at p. 923.)

Mother argues that the Department failed in its burden to inquire as there were options it should have pursued to determine if more than vague family stories supported her claim of possible Native American heritage. For example, mother looks to the statement from the Department's report—"Mother had not [*sic*] further information as to tribes and did not provide [the investigator] with any further relative information or contact numbers to call to further investigate ICWA,"—and parses it to mean only that mother did not *volunteer* such further information, and argues that the Department should have asked her for it. We do not construe this statement so narrowly; we believe the more reasonable explanation is that the investigator asked the logical follow-up questions and received no leads in reply. Indeed, the record is rife with references to mother representing that she lacks contact information for her relatives.

This case is not about whether further inquiry was required, but with whether the duty to inquire had been triggered at all. Mother did not identify which parent her purported Native American heritage came through, a relative who she believed might have further information, or a nation or tribe with which she was purported affiliated. Having previously declared under penalty of perjury that she had no Native American ancestry as far as she knew, her additional statement that her parents had told her she was " 'mixed with Indian,' " is not sufficient, standing alone, to trigger any duty on the part of the Department to further investigate. We therefore affirm.

DISPOSITION

The adjudication/disposition orders are affirmed.

RUBIN, P. J.

WE CONCUR:

MOOR, J.

KIM, J.